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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls,*
CG Docket No. 17-59**

Dear Ms. Dortch:

The U.S. Chamber of Commerce¹ in conjunction with the U.S. Chamber Institute for Legal Reform² (collectively referred to as “Chamber”) respectfully submit these comments to the Federal Communications Commission (“Commission”) in response to its Second Notice of Inquiry (“NOI”) regarding the Commission’s inquiry into targeting “unlawful robocalls” by collecting and making available information on reassigned telephone numbers.³

The Chamber has concerns about the establishment, maintenance, use, and practicality of a reassigned numbers database in any of the proposed forms and questions whether it will ultimately serve to perpetuate the abusive litigation already stemming from the outdated language of the Telephone Consumer Protection Act (“TCPA”)—

¹ The U.S. Chamber of Commerce is the world’s largest business federation, representing the interests of more than three million businesses of all size, sectors, and regions, as well as state and local chambers and industry associations.

² The U.S. Chamber Institute for Legal Reform seeks to promote civil justice reform through legislative, political, judicial, and educational activities at the global, national, state, and local levels.

³ Second Notice of Inquiry, *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. July 13, 2017).

litigation that increased 46% in the 17 month period after the FCC issued its 2015 Omnibus Declaratory Ruling.⁴

The database (which would be expensive both to create and maintain) is likely to impose considerable costs on companies that opt to (or may be required to) make use of that database, without also providing adequate protection to those companies from litigation brought under the TCPA. Further, the Chamber believes it would exceed the Commission's authority to require businesses to access the database to check for reassignments before placing calls.

However, if the FCC does determine it has such authority to move forward with such a database, its creation should be coupled with the establishment of a safe harbor so companies are appropriately protected from abusive litigation for taking affirmative steps to comply with the law.

I. Introduction

The Chamber applauds the Commission's desire to try to address consumer complaints by thinking creatively about one known problem of calls to reassigned numbers. However, the Commission cannot step into the shoes of the legislature to impose a heightened consent requirement (requiring that consent must be re-verified continuously) when accounting for reassigned numbers was never discussed by or implemented by Congress. Designing a "reassigned numbers solution" is policymaking and falls within the purview of Congress.

Further, the proposed database is an unwieldy solution to a problem that could be solved in a much easier fashion—through consumer empowerment; why not simply have consumers alert the caller (by picking up a call, sending a text message, calling back, or any means the parties agree on) that the number no longer belongs to the company's customer? The caller then has appropriate knowledge of the reassignment and the "gottcha" lawsuits based on obscure means of revocation of consent would be eliminated.

Companies placing legitimate calls to their consumers have finite resources and are seeking to reach their consumers at customer-provided phone numbers, not individuals at random. These companies are relying on phone numbers provided by their customers. It would be unduly burdensome—and could essentially qualify as an unfunded mandate on every American business—to require that business continuously access an ever-changing database, so that every call will be pre-checked first for possible reassignment, on the chance that a customer's telephone number has changed since the last communication. Additionally, if a company does not check a database, if created,

⁴ U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (forthcoming Aug. 30, 2017).

would it be subject to greater scrutiny by the courts? Checking such a database could become a floor for TCPA litigation that has already been expanded far beyond the intention of legislators.

Part II addresses the Chamber's concerns with the various proposals for a reassigned numbers database—the creation of which was not specifically authorized by Congress. Congress's purpose in enacting the TCPA was to curtail abusive and invasive telemarketing practices.⁵ There is no evidence or indication that Congress intended that TCPA compliance would require a company either to monitor a database of reassigned numbers or to hire third-parties to scrub existing customer lists for possible reassignments, in order to protect against potential class action liability for non-telemarketing calls.

If the Commission does decide nonetheless to move forward with creating a reassigned numbers database or similar system, then Part III explains why it is necessary to couple it with a safe harbor from TCPA liability for calls placed to reassigned numbers whenever a business (1) accesses and scrubs against that database/query system in a reasonable timeframe (*i.e.*, every 30 days), and (2) has policies and procedures (such as training) to ensure that customer records are updated to reflect phone number reassignments. Such a safe harbor should echo the TCPA's safe harbor that applies to the Do-Not-Call ("DNC") database.

Before proceeding with its discussion of the proposals for a reassigned numbers solution, however, the Chamber notes its concern with the NOI's use of the terms "robocallers" and "robocalls" when speaking of legitimate businesses and of the targeted calls such companies place to their own customers. The NOI uses the term "robocalls" to pertain seemingly to any call placed with modern systems.⁶ However, when a company

⁵ See, e.g., Report of the Energy and Commerce Committee of the U.S. House of Representatives, H.R. Rep. 102-317, at 10 (1991) ("The Committee report indicates that these systems are used to make millions of calls every day. . . . Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers. Once a phone connection is made, automatic dialing systems can "seize" a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up. This capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well.")

⁶ Indeed, the Commission seems to be relying on its use of "robocall" on a contested July 2015 Order in which the majority held that practically any modern technology could be deemed to have "capacity" to randomly or sequentially dial numbers, so as to be considered an Automated Telephone Dialing System or "ATDS" as defined by the TCPA. But that Order is under review. See *Rules and Regulations Implementing the*

uses modern technologies to dial a specific customer-provided number, that system should not be presumed to be employing the kinds of cold-calling technologies that the TCPA defined as unlawful if used without a recipient's prior express consent.⁷

The Commission thus should make clear that in considering solutions to lessen the number of unwanted calls stemming from reassignment, it is in no way suggesting that all complained-of calls would be "robocalls," or that all businesses using non-rotary phones are "robocallers" subject to TCPA liability for a wrong-number contact.

II. The Types Of Reassigned Number Databases Proposed In The NOI Would Not Provide A Manageable Resource For Determining If A Customer's Number Has Been Recycled.

The Commission asks for comments on four different approaches to constructing and maintaining a reassigned number database: (1) for the Commission to establish and administer a central database, such as with portability and Do-Not-Call registrations; (2) for voice service providers to report reassigned number data directly to "large, high-volume robocallers" with their own in-house databases or to "reassigned number data aggregators" who would then need to be retained by all other types of businesses for an unknown fee; (3) for voice service providers to create an interface allowing queries of its own reassigned number databases; and (4) for voice service providers to publish publicly a list of reassigned numbers.⁸

Businesses using modern technologies to send calls and/or texts, and who find themselves at risk of facing claims that a given call was an "unlawful robocall," are the planned users of the databases described in these four options. This essentially sweeps in every business, large and small, in America that seeks to contact their consumers or employees. As detailed in recent research by the Chamber, in the 17 month period after the 2015 Omnibus Declaratory Ruling was issued, lawsuits were filed against approximately 40 different industries.⁹ TCPA litigation spares no one.

Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012) (2012 TCPA Order); *pets. for review pending sub nom Chamber of Commerce v. FCC*, No. 15-1306 (D.C. Cir. filed Sept. 2, 2015).

⁷See 47 U.S.C. § 227(a) ("As used in this section—(1) The term "automatic telephone dialing system" means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.").

⁸ NOI, *In the Matter of Advance Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. July 13, 2017), at ¶¶ 16-19.

⁹ U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* (forthcoming Aug. 30, 2017).

Indeed, the Commission claims that “robocallers” have asked for a reassigned number database to be created.¹⁰ However, the five comments filed by “robodialers” in 2014 that are referenced as support for this statement do not request creation of a database to which the businesses would then be required to subscribe. Instead, in the four comments filed in 2014 by Stage Stores Inc., CCIA, Wells Fargo, and ACA, those entities simply noted that there was no such public directory of reassigned numbers, in the context of a debate over liability for wrong-number calls.¹¹ And in the fifth comment, United Healthcare specifically noted that Congress did not intend the TCPA to require callers to consult with a reassigned number registry before placing informational or transactional calls.¹²

The Commission thus should not rely on those comments to presume that businesses are asking for a reassigned number database of some sort. Instead, the Commission should consider the significant costs and burdens that would be imposed on businesses by a new database must be checked or even when the number was provided by a company’s customer.

For example, as this Commission knows from earlier petitions, Rubio’s Restaurants faced a situation in which an employee set his work phone to send automated reminders on food safety alerts to his cellular telephone. After a reassignment of that phone number to another person (which Rubio’s knew nothing about), messages that the recipient claimed were “unlawful robocalls” were placed to that phone number. Should Rubio’s be required to subscribe to a federal database, or pay a carrier or a third-party aggregator, to scan for potential number reassignments before placing calls to its own employees? Surely that could not appear to fall within the intent of the TCPA. And those bad actors actually violating the TCPA are not going to take the time to check such a resource.

¹⁰ *Id.*, NOI, ¶ 6 & fn 18.

¹¹ *See* Reply Comments of Stage Stores, Inc., CG Docket No. 02-278, at 7-8 (Aug. 26, 2014); Reply Comments of the Computer & Communications Industry Association (CCIA), CG Docket No. 02-278, at 2 (Aug. 25, 2014); Comments of Wells Fargo, CG Docket No. 02-278, at 9-10 (Aug. 8, 2014); ACA Comments, CG Docket No. 02-278, at 2 (Mar. 10, 2014).

¹² *See* Reply Comments of United Healthcare Services, Inc., CG Docket No. 02-278, at 12 (Mar. 24, 2014) (“In contrast to the specificity of Congress and the FCC in requiring telemarketers to subscribe to the national Do-Not-Call registry, the statutory and regulatory silence on an equivalent registry for informational calls to previously consented-to wireless telephone numbers must mean that the drafters of the TCPA did not intend for callers to be liable for calls to reassigned numbers or required to purchase a third-party look-up service solely for a reassigned number check.”).

Such dilemmas make clear that this proposed database is not like the Do-Not-Call database that Congress, when it enacted the TCPA, gave the Commission power to create.¹³ In the body of the TCPA, Congress required a rulemaking to evaluate whether a national database should be created to contain Do-Not-Call information that telemarketers would need to scrub against when calling consumers without the requisite established business relationship.¹⁴ The DNC database was implemented after that rulemaking, and it is clear which businesses are required to make use of the DNC database: if a non-exempt company wants to reach out via telemarketing to persons with whom it has no established business relationship (“EBR”)¹⁵, then it takes the list of phone numbers it intends to call and first scrubs that list against the national DNC registry to eliminate phone numbers registered as DNC. This simple and clean process protects against unwanted cold-call telemarketing, which was the primary target of the TCPA.

The DNC registry also established fixed costs and burdens that a company can assess when deciding to telemarket outside of its EBR. A company purchases access to the DNC registry on an annual basis: currently, access to five area codes is free, and each subsequent area code costs \$59, for up to a maximum of \$16,228 for all the area codes in the United States.¹⁶ Alternatively, the company can hire a third-party service with its own subscription to the DNC registry, and then pay that company to perform scrubs using its own subscription data. The DNC list and/or change list needs to be checked at least once every 30 days, as a company has 30 days to process and to honor a consumer’s DNC request.¹⁷ Thus, if a company decides to engage in telemarketing, it knows what types of calls must be scrubbed against the DNC list and the set costs of complying with DNC registry requirements.¹⁸ Businesses need not pay to access or use the DNC registry unless they decide to engage in a specific kind of telemarketing to non-customers.

In sharp contrast, with the reassigned number database the Commission is now considering, businesses would not have the same certainty on whether or when to scrub

¹³ See 47 U.S.C. § 227(c)(3)-(4).

¹⁴ See 47 U.S.C. §227(c)(1-4).

¹⁵ See 47 CFR § 64.1200(f)(5)(defining EBR to include current customers, former customers (for 18 months), and prospective customers (for 3 months after an inquiry)).

¹⁶ See <https://telemarketing.donotcall.gov/faq/faqbusiness.aspx>, at Registry Fees.

¹⁷ See 47 CFR 64.1200(c)(2)(i)(D) (requiring telemarketers to employ a version of the national do-not-call list obtained from the federal administrator at most 31 days before a marketing call is made).

¹⁸ Importantly, so long as the company has appropriate policies, procedures, and training, and meets other set conditions, it has an affirmative defense to protect against TCPA claims that could arise from an error. See 47 U.S.C. §227(c)(5)(c); see also 47 CFR 64.1200(c)(2)(i).

against the database when placing non-marketing calls. First, as the Commission is well aware, the state of the law is unclear as to what constitutes an “autodialed” call that could be subject to TCPA liability.¹⁹ Second, even if a company did decide that it needed to check for reassigned numbers in the event its calls were considered unlawful absent prior consent, how could it ensure immediate knowledge of a reassignment? For example, if a company checked to ensure that a customer’s number had not changed on May 1, must it check again on May 3 before placing another call to a customer-provided number? Must it conduct scrubs, or make queries to the phone providers, before every communication?

Such requirements could be prohibitively expensive, and would chill necessary and desired communications. For example, a company may have a practice of reaching out to a customer whose service is about to be disconnected to advise that customer of the impending shut-off and encourage payment. Under these circumstances, it does not seem reasonable for that company to first figure out the phone provider for that person, query the provider as to whether the phone number has been reassigned, and then place the call only with that all-clear. Nor would it be reasonable to require a company to access public or FCC databases (likely through a data aggregator) to look for a change in ownership of the customer-provided number.

The expense and effort involved in such continual scrubbing would be tremendous, particularly when the company is simply reaching out to a customer-provided number for which it has a good faith belief that prior express consent exists. Indeed, important communications that are intended to help customers would be chilled by the need to treat every customer-provided number with suspicion until it is checked by the company or a third-party aggregator.

III. A Reassigned Number Database Would Only Be Useful If Coupled With A Safe Harbor.

While the Commission’s database may potentially provide some benefit in dealing with reassigned phone numbers, for the reasons detailed above, the Chamber has concerns. Should the Commission move forward with the creation of a database despite the issues discussed above, it should provide a safe harbor to businesses that make use of the reassigned number database to locate and remove recycled numbers from their customer records.²⁰

Regardless of the Commission’s intent, the availability of a reassigned number database, absent a safe harbor, may encourage additional litigation under the TCPA. While the existence of a database could, depending on its structure and accessibility,

¹⁹ See fn. 4, *infra*.

²⁰ See NOI, ¶ 14.

allow companies to remove reassigned numbers from their records, the TCPA remains a strict liability statute. Plaintiffs and their counsel are certain to argue that any mistaken call to a reassigned number is evidence of inadequate effort by a business to reconcile its records with the reassigned number database, that such calls are “willful,” and seek heightened statutory penalties.

A safe harbor would effectively encourage companies to proactively review their records and eliminate reassigned numbers. Therefore, the Chamber recommends that any safe harbor be based firmly in the affirmative defense established under the DNC section of the TCPA, which clarifies that there can be no liability when errors occur, and such a safe harbor should pertain to calls place to landlines, VoIP, or cellular numbers. A modification of that safe harbor language, to match the proposed reassigned number database, would read as follows:

. . . Any person or entity making telephone [calls] (or on whose behalf telephone [calls] are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards

(A) Written procedures. It has established and implemented written procedures to comply with the [reassigned number rules];

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the [TCPA];

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national [reassigned numbers] database. It uses a process to prevent telephone [calls] to any telephone number on any list established pursuant to the [calling] rules, employing a version of the [reassigned numbers database] obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

(E) Purchasing the [reassigned numbers] database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the [reassigned numbers] database, or any part thereof, for any purpose except compliance with this section and any such state or federal law

to prevent telephone solicitations to telephone numbers registered on the national reassigned numbers database.²¹

Further, because small businesses are least likely to be able to afford the access to the reassigned number dataset or the payments required by data aggregators in order to check whether numbers have been reassigned, they should be covered by the safe harbor. Small businesses with a majority of customers in their own local area should not be liable for any failure to use a database tool to discover that a customer's number has been reassigned.

IV. Conclusion

The creation of a reassigned number database is not just about “robocalls” or “robocallers.” These words allude to a never-ending barrage of calls consumers do not want to receive from entities such as “Rachel from Cardmember Services.” Instead, the FCC should be careful when framing this issue to consider that under the current litigation climate of the TCPA, nearly every call a company makes to its customers or employees is swept in under this definition. This includes calls consumers want to receive, such as flight delays, fraudulent account notifications, credit card reject notifications, service outages, payment reminders, appointment reminders, and school closings.

The reality of the TCPA has resulted in American companies being subjected to lawsuit roulette each time they pick up the phone or send a text message to consumers due to reassigned phone numbers. While the Chamber appreciates the FCC's efforts to uphold the core of the TCPA as a consumer protection statute, the creation and imposition of checking a reassigned number database each time a business—large or small—needs to contact its consumers falls short of striking the right balance between consumer and business protection. A reassigned number database could prove to be a complex, costly, and burdensome way to resolve a problem that has an easier solution—requiring consumers to notify the caller of the reassigned phone number—and ultimately any costs associated with checking such a database seemingly impose an unfunded mandate on every business using phone calls or text messages as a means of communication.

However, if the Commission does move forward with such a proposal, it must be coupled with a safe harbor to give businesses the necessary protection from abusive litigation, after taking affirmative steps to comply with the law. And in such an instance, the Chamber offers itself as a resource and hopes to continue working with the

²¹ See 47 CFR 64.1200(c)(2)(i) (modified to replace “DNC” with “reassigned numbers”) (emphasis added).

Commission to ensure a product that is not overly burdensome on those providing the information to populate the database, as well as those using the database as a resource.

Respectfully Submitted,



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